

HONG KONG / JUDGMENT

HKSAR v. HO KWOK WA

COURT

Court of First Instance

DECIDED

13 September 2007

CASE / FILE NUMBER

HCMA211/2007

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bjbj HCMA211/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE (Appellate Jurisdiction) MAGISTRACY APPEAL NO.211 OF 2007 (ON APPEAL FROM TWCC 997 OF 2006)

BETWEEN HKSAR Respondent and HO KWOK WA (appellant was convicted on 26 January 2007 by a magistrate sitting in Tsuen Wan Magistracy of two offences laid under section 73 of the Crimes Ordinance, Cap. 200, namely using a false instrument. Two similar charges were laid against him, and after he was convicted of both charges he was sentenced to 18 months imprisonment on each charge, to be served concurrently. He remained in custody from that day until 30 August 2007 when I admitted him to bail pending appeal after the first day s hearing of this appeal. He now appeals against both the conviction and sentence. AUTONUMOUT The particulars of the charges are that, in relation to the 1st Charge, in February 2005, the appellant had used a wages verification form which he knew or believed to be false with the intention of inducing the sub-contractor, Ho Biu Kee Construction Engineering Co. Ltd (Ho Biu Kee), to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person s prejudice. This wages verification form was for the period of 17 January 2005 to 31 January 2005. AUTONUMOUT The 2nd Charge was in similar terms save that the date of the offence is 15 April 2005 and the wages verification form in that charge was for the period of 1 February 2005 to 31 March 2005. AUTONUMOUT What had happened was in relation to a construction site where China Construction Co. Ltd (China Construction) was the main contractor and the company mentioned in the charges, Ho Biu Kee was the sub-contractor. The appellant s company was the sub-sub-contractor in charge of the iron-sheeting work for that construction site. The evidence showed that it was a contractual requirement by the main contractor that the sub-contractor had to submit periodically wages verification forms to show that the workers had been paid their wages before the main contractor would process any applications for payment by the sub-contractor. That requirement was apparently imposed because of a provision in the Employment Ordinance which is to the effect that if any worker is not paid his wages he can sue his employer or the contractors further up the line from his own employer. That is a provision in section 43G of the Employment Ordinance. AUTONUMOUT The

evidence by PW1 who was the project manager of Ho Biu Kee was that in relation to the iron-sheeting work, he had to submit the wages verification forms of the appellant's company to the main contractor before the main contractor would process his company's applications for payment. Insofar as the contract between Ho Biu Kee and the appellant's company was concerned, the contract for that was not produced during the trial and so it is not clear whether there was a similar provision in that contract. Insofar as applications for payment by the appellant's company to the sub-contractor were concerned, this appeared to have been based on the amount of actual work done by the appellant's company. It is the prosecution's case that when the appellant submitted these two false forms to PW1, he was intending that PW1 would then process applications for payment to the appellant's company. AUTONUMOUT The ingredients of the offence under section 73 are firstly, that the prosecution has to prove that the document was false, secondly, that the appellant knew or believed the document to be false and, thirdly, that when the appellant used the instrument he had the intention firstly of inducing the person to whom the document was delivered to accept it as genuine and secondly, that he had the intention that that person would do or not do some act to his own or any other person's prejudice. AUTONUMOUT Whether the document is false or not is set out in section 69 of the Crimes Ordinance and there are eight circumstances under which the document can be false, but for the purposes of this case only two are relevant, namely

- (a) an instrument is false if it purports to have been
 - (i) made in the form in which it is made by a person who did not in fact make it in that form; .
 - (iii) made in the terms in which it is made by a person who did not in fact make it in those terms; AUTONUMOUT Prejudice is defined in section 70 of the same Ordinance which states an act or omission intended to be induced is to a person's prejudice if, and only if, it is one which, if it occurs, will and there are then six circumstances which are set out in section 70(1) of which (a) is relevant to the present case, namely that the act or omission results in the person's permanent or temporary loss of property. AUTONUMOUT It is accepted by both parties that the prosecution has to prove a double intention in respect of these offences, and the authority for that is the case of *R. v. Tobierre* [1986] 1 All ER 346 which was the decision of the Court of Appeal in England. That case was followed in *R. v. Emilio Garcia* [1988] 87 CAR 175. AUTONUMOUT The evidence showed that the first document (Exh. P1) was handed to PW1 by the appellant in early February 2005 and the second document (Exh. P2) was received by PW2, the site foreman of the sub-contractor's company, on 13 April 2005. The evidence by PW1 was that after he saw Exh. P2 he instructed PW2 to ask the appellant to change the date on Exh. P2 so that it would include the wages for the month of March
2005. The form was originally only for the wages for the month of February 2005 and PW1 was of the view that since it was already April the wages for March should have been included in that document if in fact by then the wages for March had been paid. AUTONUMOUT The evidence showed that on 15 April 2005 the appellant came to the sub-contractor's company and, in the presence of PW2, applied some tipex to the date 28 February and amended it to 31 March 2005. At the request of PW1, the appellant also signed against the tipexed date in

PW1's presence. AUTONUMOUT This evidence was prejudicial to the appellant because it showed that he was prepared to change the date from the end of February to the end of March without bothering to take the form back to the workers so that the workers could confirm that their wages for March had been paid and to re-sign the document if required. AUTONUMOUT The trial lasted three days and the magistrate had to deal with a lot of evidence and a lot of details. Unfortunately in considering the two charges he did not consider the evidence on each charge separately, because in his Statement of Findings when after he had made certain finding of facts after he had summarized the evidence of each witness, he drew certain inferences and in doing so, he had considered together the evidence as it related to each of the documents. He said in para. 20 in his Statement of Findings Based on the above facts, the only reasonable and irresistible inference is, when the Defendant gave P1 to PW1 in February 2005, and when (he) signed on Exhibit P2 on 15th April, he knew full well that the signatures of workers (i.e., the signatures on the two documents) were false, and he knew that the wages of workers on P4 (i.e. PW4) for March had not been paid. In this aspect, the document was false. But after receiving that document, PW1, representing the subcontractor, was induced to come to the belief that the contents of the document and the signatures on it were genuine and that relevant workers had signed to confirm their wages for that period had been released. AUTONUMOUT The evidence of what happened on 15 April was very much against the appellant's case because it showed that he was prepared to make the material alteration to the document without asking the signatories to re-sign the document. It may well be that the magistrate was influenced by this piece of evidence when he considered the rest of the evidence against the appellant. AUTONUMOUT The first ingredient which the prosecution has to prove is that the document was false. Miss Chan, for the respondent, is quite right that the two situations out of the eight mentioned in section 69 are disjunctive and as long as one situation was proved the document is shown to be false. She submits that because, and this was supported by the evidence of PW4 and the admitted facts, 11 out of the 23 workers who had purportedly signed on the form did not in fact sign on those forms, the document was already false. Mr Collins accepts that is the correct decision in law and he accepts that the document had been shown to be false. AUTONUMOUT The second ingredient is : Did the appellant know or believe the document had been false? There was no evidence of who had created these two documents. There was nothing on the documents which showed that the appellant had seen those documents or their contents. In drawing the inference that the appellant knew full well that the signatures of the workers were false, the magistrate did not say why and how he was drawing that inference. He simply said based on the above facts which were stated by him and the finding of facts ran from (a) to (h). AUTONUMOUT It may well be that because of what the appellant did with P2, he knew or suspected or believed that the signatures of the workers were false, but that judgment cannot apply to P1 which was submitted to PW1 under quite different circumstances. Assuming that the prosecution did prove and the magistrate was entitled to draw the inference that the appellant knew or believed the documents to be false, the double intention on the part of the appellant still had to be proved by the prosecution. AUTONUMOUT In so far as P1 was

concerned, the evidence by PW4 who was the only worker who gave evidence for the prosecution was that the wages of the workers for that period (17 to 31 January 2005) had been paid. He said he did not see P1 before nor did he sign on it. He was however unaware of when the wages for that period were paid because he said the wages were paid either by a payment into their bank accounts by the company or by the company giving them a cheque. In any case the evidence is not clear about when P1 was submitted to PW1 by the appellant, whether by that day the wages for 17 to 31 January had been paid.

AUTONUMOUT Collins was content to base his submission on the premise that it had not been proved by the prosecution that when that document was submitted the wages had not been paid. AUTONUMOUT Even if the appellant, in relation to P1, knew or believed that that document was false in the sense that he knew that the workers had not signed on that document, he would have had to know that the document was also false in the sense that the workers had not been paid their wages before he could have the intention to induce PW1 to accept that document as genuine. He must have that first intention before it can be said that he also had the second intention of intending that PW1 would do some act to his or any other person's prejudice. AUTONUMOUT In my view the evidence was unclear about whether by the time of the submission of P1, the wages for that period had been paid to the workers. If one is left with the possibility that the wages had in fact been paid, then there would have been no question of the appellant intending to induce PW1 to accept that document as genuine. It would appear that the appellant knew that he was required to submit these documents to PW1's company for PW1's company to resubmit them to the main contractor to enable PW1's company to be paid by the main contractor.

AUTONUMOUT Insofar as payments to the appellant's company were concerned, Mr Collins relies on three defence exhibits to show that the payments which were in fact made to the appellant's company were wholly independent of the wages verification forms submitted to PW1. AUTONUMOUT Exhibit D8 was a document prepared by the appellant's company which showed all the payments which it received from the sub contractor. The first three payments making up a total of \$300,000 was said to be an advance payment. The next payment of \$206,036 on 18 March 2005 was by way of a cheque issued to the appellant's company by the sub contractor. On that day the second document, exhibit P2, had not been submitted to PW1 and the wages for the month of January appeared to have been already paid. AUTONUMOUT The next payment was on 9 April 2005 which was for the sum of \$250,000, also by way of a cheque issued by the sub contractor to the appellant's company. Again on the day of this payment P2 had not been submitted to PW1 and it was really only the last payment on 18 April 2005 for the sum of \$120,706 that exhibit P2 had been submitted to PW2. AUTONUMOUT Miss Chan for the respondent questions the accuracy of that document, Exh. D8, because she said there had been evidence by PW1 that there were two advance payments, one of \$300,000 and the second of an unspecified amount and she says that from that evidence it can be implied that the second advance payment was for the sum of \$506,036 which she says is not reflected in Exh. D8.

AUTONUMOUT cannot accept that submission and my view is that the sum of \$506,036 mentioned in Exh. D8 was the cumulative amount adding together \$300,000 representing

the advance payment and the payment of \$206,036. In relation to Exh. P2 the evidence appeared to be that the wages for February 2005 were paid to the workers so it can be said that when P2 was originally submitted to PW1, insofar as the question of payment of wages was concerned, it was true. AUTONUMOUT It was apparently at the request of PW1 that the appellant amended the date of that form to include the wages for March

2005. It appears to me that the reason why the appellant was so willing to do that was because he knew that the payments to his own company were not dependent on that form. He might or might not have known that for the contractor company to receive payments from the main contractor, the sub contractor had to submit these wages verification forms signed by his (the appellant
- s) workers. The evidence was that sheet piling was solely the responsibilities of the appellant s company and no other company was involved. AUTONUMOUT However, as it was pointed out, the appellant did amend Exh. P2 to include the wages for March
2005. A pertinent feature of the evidence was that when Exh. P1 was submitted to the main contractor, it was accompanied by a guarantee P5 which was signed by PW1 himself, which guaranteed to the main contractor that the information in the wages verification form was all correct and PW1 guaranteed that all the workers had received their wages payment for that period. AUTONUMOUT This form was signed by PW1 dated 27 February 2005 and the sub contractor s company chop was appended to that form. In relation to P2 the form when submitted to China Construction was accompanied by a similar guarantee Exh. P4 which in this case was signed not by PW1 but by the appellant himself and had the appellant s company chop on it. AUTONUMOUT The magistrate in his Statement of Findings said that he accepted the evidence of all the prosecution witnesses PW1, 2, 3, and
4. The only qualification that he made to that acceptance was that where there were any differences between the evidence of PW1 and PW2, he accepted the explanation of PW1 and not PW2. He did not specify what the differences were but a germane difference pointed out by counsel was that whereas PW1 had insisted that payments to the appellant s company would only be made after the submission of the wages verification forms, PW2 said that that was not the case and that payments to the appellant s company were made independent of the wages verification forms. The magistrate did not analyse the evidence of PW1 and accepted his evidence in total. AUTONUMOUT A very important part of the evidence that Mr Collins relies upon to show that PW1 knew or must have known when P2 was submitted to him that the wages for March 2005 had not been paid, was a letter that PW1 wrote to the main contractor (Exh. D7) dated 29 April 2005 when PW1 wrote to the main contractor in these terms Our company has held many discussions over the past few days with your company s site QS regarding the payroll for the sheet piling works in March as we are still having different points of view on the additional items. Therefore, the wages have not been paid and the morale of the sub contractor and the workers is low. AUTONUMOUT The reference to the wages not having been paid clearly is a reference to the wages for March

2005. Taken at its face value, that shows that on 29 April 2005 PW1 knew that the wages for March had not been paid. Miss Chan's submission on this is that was on 29 April and that was the extent of PW1's knowledge on that day, but that is not conclusive evidence that on the material days, namely from 13 April to 15 April, PW1 must also have had the same knowledge, that is, that on those two days PW1 might have been labouring under the impression that the wages for March had been paid. That submission by Miss Chan is correct insofar as it goes but that is not the whole extent of the evidence because Mr Collins also relies on another part of the evidence by PW1 himself where, when he was asked about why he had written the letter (Exh. D7), he said, inter alia, the morale had been low all along due to how the past deeds were carried out, matters like no wages payments etc. I knew that he has not yet paid the wages. AUTONUMOUT PW2 who was the site foreman, who was also on the site every day as was PW1, also spoke of the workers at some stage being unhappy because of non payment of wages. PW2's evidence was not very specific but he said during the time he worked on the site he had seen workers sent to his company's office complaining about the matter of no wage payment and that these workers were the employees of the appellant's company. So it would appear, and in my view, this should have been considered by the magistrate, that when P2 was submitted to PW1 there was a real possibility that he knew that the wages for March had not been paid. If PW1 was aware that the wages for March had not been paid, then there could have been no question of the appellant when he submitted that document, having the intention of inducing PW1 to accept that document as genuine. If the first intention on the part of the appellant could not have been proved beyond a reasonable doubt by the prosecution, then whether or not there was the second intention becomes academic. AUTONUMOUT am of the view, having regard to all the matters that I have mentioned, that these convictions cannot be allowed to stand because, in my view, there are reasonable doubts about the appellant's guilt of these two offences. The appeal against conviction is therefore allowed and the convictions and sentences are quashed. (Peter Nguyen) Judge of the Court of First Instance High Court Miss Agnes Chan, SGC of Department of Justice, for HKSAR Mr James Collins & Miss Karen Cheung, instructed by Messrs P.H. Chan & Co., for the Appellant PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk H I J K L M N O P Q R S T U V t" (# t" (# & `#\$ "@AB eH[; eH[; & 6" ABC.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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